IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB-REGISTRY)

AT KIGOMA

CRIMINAL SESSION CASE NO. 6 OF 2023

REPUBLIC

VERSUS

ALLY RAJABU @ MBOGO ..... ACCUSED PERSON

JUDGMENT

29/02/ & 29/04/2024

NKWABI, J.:

The accused person earns his living through driving a motor vehicle and selling local brew in his bar which is located near his family compound. He admits that on the fateful day, he was selling local brew which is called Kayoga. He also categorically admits that the deceased was injured while he was at the bar of the accused person. Withal, the accused person faces an information on manslaughter which is contrary to section 195 (1) and section 198 of the Penal Code. The incident is said to have happened on 28th day of April 2021 at Kibirizi – Rasini area in Kigoma district.

What he seriously maintains is that he is in no way responsible for the death of the deceased. Further the accused person insists that the deceased was injured due to a fighting with someone namely Paschal over sharing of money. He asserts that the deceased was injured when he fell

on a knife which he was possessing. I take the liberty to quote what the accused person said in his defence:

> *"Juma Shuku had a small knife on the side of his waist ... Paschal said the knife pierced Juma Shuku when he fell down ..."*

The accused person further said he reported the incident to the police but would not say if he was supplied with an RB rather confirmed, in cross-examination, that he was not supplied with one. He also said he reported the incident to the street chairman but was controverted by the street chairman. Truly, he disputed to have any quarrel with the deceased. The accused person contradicted himself on how the street chairman went to the police out-post following the incident. In examination in chief, he said the street chairman went to the police out-post on a motorcycle but in re-examination stated that the street chairman went to the police out-post on foot. The accused person neither had any person to bear him out his defence nor any exhibit to produce in support of his defence.

The prosecution is banking on a dying declaration by the deceased made to PW.1 Zephania, who said, *"He told me it was Ally Mbogo who had injured him."* It also stakes on a dying declaration made by the deceased

to PW.2, the street chairman, who said the accused person stated that he was fighting with the deceased who fell on a knife, *"but the deceased said the accused person pierced him with a sharp-edged object".* That dying declaration was re-echoed by PW.3. PW.4 Lushita, a police officer, investigated the case and tendered a sketch map of the scene of offence as exhibit P.2., Dr. Iddi, conducted the post mortem examination and recorded a report thereafter. The report was admitted as exhibit P.3. It was the opinion of Dr. Iddi that the deceased died as a result of excessive bleeding due to a deep cut wound. PW.6. Sgnt. Peter, recorded the statement of Divine. That statement was admitted as exhibit P.4 for Divine was nowhere to be found.

During the trial, the prosecution was represented by Ms. Edna Makala, Mr. Samwel Peterlis and Ms. Joyce Raphael, all learned State Attorneys. The accused person enjoyed the services of Mr. Elinisadi Samwel Msuya, learned advocate. Parties were not interested in filing final submissions at the close of the defence case.

The germane issue in this case is whether the accused person authored the death of Juma Shuku. In other words, the question is whether the prosecution has proved its case against the accused person beyond reasonable doubt, howbeit for manslaughter.

The prosecution is unswerving that the accused person is responsible for the death of the deceased, though he had no intention of killing the deceased on account of the circumstances pertaining the death as per **Francis Alex v. Republic,** Criminal Appeal No. 185 of 2017 CAT.

It is a predictable law that the burden of proof lies in the prosecution to prove the offence beyond reasonable doubt, see the case of **Mohamed Said Mtula v. Republic** [1995] T.L.R. 3 (CA) where it was underscored that:

> *"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."*

No doubt that it is worn-out law that an accused person cannot be convicted on the weaknesses of his defence but the strength of the prosecution evidence as per **John Makolobela Kulwa Makolobela & Another v. Republic** [2002] T.L.R. at page 296 where it was held that:

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the*

strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."

See also as stated in **Sarkar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon,** 14th Edition 1993 at P. 1338 thus:

"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."

The position of the law as stated in **Sarkar's** excerpt above is similar to that was held in the case of **Hatibu Gandhi v. Republic** [1996] T.L.R. 12 where the Court of Appeal of Tanzania required the defence of the appellants to have cogency in order to water down the strong case of the prosecution.

The prosecution has got assistance, on the dying declaration from the decision in **Sangaru Lugaira Mathias v. S.M.Z.,** Criminal Appeal No. 183 of 2005 (CAT) at DSM the Court of Appeal of Tanzania had an opportunity to deal with akin situation in the following authoritative manner:

"In ground two, Mr. Uhuru vehemently criticized the trial Chief Justice in basing the conviction on the alleged

statement of the appellant to PW1, PW2, PW3 and PW6 at the Police Station that he had cut the deceased with a panga. These witnesses, the counsel further submitted, contradicted each other in their evidence. They were unreliable Mr. Uhuru charged. ...

The issue raised in this ground turns on the credibility of the witnesses. ...The learned trial Chief Justice who had the opportunity of seeing, hearing and assessing the credibility of these witnesses, found PW1 and PW3 truthful witnesses. This, we think, he was entitled and we can find no ground for faulting him as Mr. Uhuru urged. This finding, in our view, is in accord with the dying, declaration of the deceased in which she said she was cut by the deceased with a panga."

There is no doubt that the deceased died an unnatural death which was caused by cut wound which led to excessive bleeding. That account was not confuted by the defence, indeed the defence boosted it by saying that the deceased fell on a knife. Exhibit P.3 and the testimony of Doctor Iddi corroborates the testimonies of other witnesses. I firmly find that the

deceased met his untimely death through unnatural cause which was through sustaining a cut wound inflicted through a sharp object which led to excessive bleeding and death. Much of the alleged that he reported the incident to the police and that he tried to stop the deceased and Paschal from fighting were raised by the accused person during defence hearing, not during cross-examination of the prosecution witnesses who are the relatives of the deceased. The allegations are dismissed in terms of **Augustino Kaganya & Others v. Republic** [1994] T.L.R. 16 (CA) it was held that:

> *"... in his defence the first appellant denied knowing the deceased leave alone killing him. He advanced defence of alibi and said that Yusufu, (PW2), told lies against him because there was enmity between them as he, (PW2), believed that he (first appellant) had reported to game scouts that he, (PW2), was manufacturing bullets illegally. This defence was apparently not believed by the learned judge and in our view rightly so. If there was indeed such enmity one would have expected him to cross-examine the witness, PW2, on the alleged bad blood. That he did not do so tends to show that his defence of enmity was an afterthought."*

Elsewhere it was stated in **Paschal Kitigwa v. Republic,** Criminal Appeal No. 161 of 1991, CAT (unreported), where it was underscored that.

> *"...it is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused. On this, numerous decisions have been made by the then Court of Appeal for Eastern Africa- see* ***R. v. Said Magombe (1946) EACA 1645 and Migea Mbinga v. Uganda*** *(1967) EA 71"*

My view, in this case, is backed by the position taken by the Court of Appeal of Tanzania in **Joseph Hamis & Another v. Republic,** Criminal Appeal No. 13 of 1990, CAT (Unreported):

> *".... We are firmly of the view that where cause of death is not medically established, that is not necessarily fatal to the charge. This is so if there is other cogent evidence, direct or circumstantial from which to arrive at a conclusion as to the cause of death. The deceased in this case had sustained a bruised neck, a cut wound on the head and a fractured neck. Considering the nature of*

these injuries, especially those on the neck, we are of the view that they cannot have been self-inflicted, and indeed there has been no suggestion whatsoever to that effect. We think that they were sustained in the cause of violence or assault on the deceased, and that the deceased must have died from the injuries inflicted, in the exercises of such violence or assault."

In his defence, the accused person is claiming that the deceased person's death was not caused by his fatal stab but due to the fight by another person called Paschal. This suggests that the accused person is implying that the dying declaration is not authentic due to mistaken identification or something else for instance a grudge. But all these suggestions are not supported with the evidence particularly with the assistance of the defence of the accused person himself. He claims to have recognized five persons who came to his bar at a later time. He said they were Burundians and were relatives of PW.3. In the premises, though the incident happened during the night, recognition of the culprit by the deceased is impeccable. My stance is supported by **Rajabu Khalifa Katumbo & 3 Others v. Republic** [1994] T.L.R. 129 CA where it was held that:

"Where the accused were known to the witnesses well before the day of the incident; the witnesses, therefore, were extremely unlikely to mistake them."

Due to the defence of the accused person, no person can suggest that the deceased mentioned the accused person as the culprit of the fatal stabbing due to grudges, that was refuted by the accused person who said in his defence that he had no any grudge with the deceased. My approach of considering the defence of the accused person is backed by **Richard Matangule & Another v. Republic** [1992] T.L.R. 5 (CAT). The Court of Appeal had these to say:

"... these deliberate lies and the refusal to give an explanation corroborate the case for the prosecution that the appellants are responsible for the death of the deceased."

See also **Pascal Mwita & 2 Others v. Republic** [1993] T.L.R. 295 (CAT) which quoted with approval **R. v. Erunasoni Sekoni s/o Eria & Another** (1947) 14 EACA 74 where it was stated that:

"Although lies and evasions on the part of an accused do not in themselves prove the fact alleged against him, they

may, if on material issue be taken into account along with other matters and the evidence as a whole when considering his guilt."

The falsehood of the accused person's defence about the presence of six persons at his bar and that it was Paschal who inflicted the fatal injury on the deceased is made glaring by the failure to cross-examine the prosecution witnesses on the same in order to show the line of defence of the accused person.

After the prosecution has established a prima facie case against the accused person, though not required to prove his defence, the accused person was under an obligation to give cogent explanation as to who inflicted the fatal injury on the deceased's right hand leading to his death as opposed to himself, see **Hatibu Gandhi v. Republic** [1996] T.L.R. 12. Instead of bringing such cogent explanation, the accused person testified false testimony in material particular. Further, the defence was tainted by irreconcilable contradictions on the accused person's arrest. The false testimony on defence corroborates the prosecution case as it was held in **Mwita's** case (supra).

Having discussed the evidence of both parties as I have endeavoured herein above, I am satisfied that the evidence of the prosecution which is comprised of six witnesses and four exhibits has proved the charge beyond reasonable doubt. The defence of the accused person which has three witnesses is unmerited, so it is dismissed. The to the purpose issue raised at the pretty beginning of this judgment are answered in the affirmative. The unnatural death of the deceased was caused by excessive bleeding that ensured after the deceased sustained a cut wound inflicted by the accused person.

In summary, the accused person, in his defence raised the following battlegrounds:

1. The death of the decease was caused by a quarrel among his clients.
2. He tried to tell them to go away but they refused.
3. He used to know them. (However, it is very unlikely for a relative to protect a culprit relative and fabricate a criminal case to another person) they would have railed against him.
4. That the incident happened when he had gone to fetch a gallon of five litters of local brew. (if the deceased was quarreling with Paschal, and paschal injured him, he would definitely mention him

to be the culprit). There were solar bulbs illuminating inside and outside the bar.

5. He went to Kibirizi police outpost to report the incident where he found constable Zephania
6. He also went to report and get assistance from the street chairman who distanced himself from.
7. He was incarcerated just because the incident happened at his bar.
8. Denied to have any quarrel with deceased.

I think that I am very much entitled to reject all the eight spheres of defence of the accused person. More so, on the basis of **Rungu Juma v. Republic** [1994] T.L.R. 176 (CAT) where it was stated that:

> *"…. We are of the view that the appellant's admission that he was present at the scene of crime on the material day does to some extent corroborate the complainant's (PW1), the child evidence that it was he who attacked the appellant and stole his cattle.*
>
> *That a child's evidence may be corroborated by the defence of the accused is evident from the decision in R. v. Okelo Anyaro (1938) 5 EACA 140. Appeal dismissed."*

Consequently, the accused person is found guilty of manslaughter. I convict him of manslaughter contrary to section 195 (1) and 198 of the Penal Code, Cap. 16 R. E. 2022.

It is so ordered.

DATED at **KIGOMA** this 29th day of April 2024.

J. F. NKWABI

JUDGE

PREVIOUS RECORDS

Ms. Makala: The convict is the first offender. We pray for severe punishment to address the offence also to be a lesson to the convict and other persons. The appellant cut shot the live of a person who would help his country in economic development. Further the accused person used an instrument which had sharp edge and caused the death of the deceased.

MITIGATION

Mr. Msuya: We pray for a lenient sentence for the following reasons:

1. The convict is the first offender,
2. The convict is remorseful of the offence. He is a person of good character. He had no intention to commit the offence as per the evidence. Let the Court should not impose a sentence just as a lesson to the public at large.

3. He has family and relatives depend on him for a living. The last child of the convict is very infant
4. The circumstances of the incidence call for a lenient sentence We pray the Court imposes a very lenient sentence. Thus, we pray for a lenient sentence. That is all.

SENTENCE

Court: I have considered the common ground that the convict is the first offender and that the killing ensured in the circumstances which appear to be in a fighting. The prosecution prays for a stiff punishment while the defence plead for a lenient sentence among other he has a family that depend on him.

Though in normal circumstances manslaughter offence attracts life imprisonment, the above narrated factors have to be considered in determining proper sentence in the circumstances. For instance, life imprisonment is to be reserved for manslaughter offence, which is of the worst of its kind, which, however, experts say that has never happened.

Further, I have taken due consideration that the fatal incidence happened while the deceased and the convict were in a fight.

For the reasons above I sentence the convict to serve ten (10) years imprisonment which, in my view, addresses the offence and it is a deterrent for others persons from committing a similar offence.

It is so ordered.

Court: Sentence delivered this 29th day of April, 2024 in open Court.

J.F. NKWABI

JUDGE

Court: Right of appeal is explained.

J.F. NKWABI

JUDGE

29/04/2024